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OPINION OF THE FOURTH CIRCUIT

504 F.2d 52 (1974)

(Entered October 1, 1974)

DAVID R. McGEORGE CAR CO., INC., *Appellee*,

v.

LEYLAND MOTOR SALES, INC., *Appellant*.

DAVID R. McGEORGE CAR CO., INC., *Appellant*,

v.

LEYLAND MOTOR SALES, INC., *Appellee*.

Nos. 73-2114, 73-2115.

United States Court of Appeals, Fourth Circuit.

Argued Feb. 7, 1974.

Decided Oct. 1, 1974.

FIELD, Circuit Judge:

David R. McGeorge Car Co., Inc., (McGeorge) brought this action against Leyland Motor Sales, Inc., (Leyland) and its parent corporation, British Leyland Motors, Inc.,[1] alleging that an arrangement in the sale of automobiles constituted bad faith dealing in violation of the Dealers Day in Court Act (DDICA), 15 U.S.C. § 1222, and was also in violation of federal antitrust statutes. The district court awarded relief under the DDICA and the Robinson-Patman Act for Leyland's deliberate shortage of one line of automobiles to McGeorge in an attempt to coerce its acceptance of additional lines. However, the district court refused to grant relief under either the DDICA or the antitrust acts for British Leyland's refusal to renew Mc-

[1] British Leyland Motors, Inc., the parent corporation, was subsequently dismissed as a party defendant.

George's dealership, after the latter had declined the additional lines of automobiles. Both parties have appealed.

David R. McGeorge Car Co., Inc., was founded in 1960 by David R. McGeorge who managed the company until an illness in February of 1970 when his son Robert assumed control. Throughout the 1960's McGeorge sold three lines of automobiles, Mercedes-Benz from 1960 on, Triumph from 1963 to mid-1970, and Toyota continuously from 1968. None of the cars was competitive with the other since Mercedes-Benz sold for approximately $6,000, Triumph for $2800 and Toyota for $2,000. McGeorge's dealership agreement for the sale of Triumphs, signed originally with the Standard Triumph Motor Company in 1963, was renewed for two years in July, 1968, with Leyland Motor Sales, Inc., the northeast regional distributor for British Leyland Motors, Inc., which had acquired the Standard Triumph Motor Company.

In addition to its acquisition of Triumph, in April of 1967 British Leyland purchased The Rover Company, Ltd., manufacturers of Land Rover, a cross-country vehicle, and Rover, a luxury sedan in the Mercedes and BMW class. Shortly thereafter British Leyland initiated a policy designed to couple the high consumer appeal of Triumph with its newly acquired Rover and Triumph dealers throughout the United States were presented with a proposal that in order to continue selling Triumphs they should begin selling Rovers and Land Rovers. At the time of the proposal, Triumphs, already in high demand, began experiencing shortages as a result of labor problems in England. British Leyland was then in the position of allocating an item in high demand and short supply among dealers who had been presented with British Leyland's offer of Rover and Land Rover. McGeorge declined the proposal based upon its assessment that Rover had little sales potential and the fact that Rover would compete with Mercedes-Benz which it was already selling.

In October 1969, Leyland Motor Sales, Inc., began cutting McGeorge's supply of Triumphs in an attempt to persuade it to reconsider the Rover and Land Rover proposal. Whereas the supply of Triumphs was off 10 to 20 percent nationally in 1969, McGeorge's supply was cut by 50 percent in that year and an additional 16 percent in 1970. Conversely, other Virginia Triumph dealers who had accepted Rover and Land Rover experienced only a 25 percent cutback in 1969 and increases of up to 93 percent in 1970. When in May of 1970 it became clear that McGeorge's rejection of Rover and Land Rover was final, Leyland Motor Sales, Inc., recommended to British Leyland that McGeorge's Triumph dealership not be renewed upon its normal expiration in July, 1970. The dealership was not renewed and in September of 1970 David R. McGeorge brought this action.

I

In awarding McGeorge relief under the Robinson-Patman Act the district court, relying on *Contex-Winston Corp.* v. *Edward Hines Lumber Co.*, 447 F.2d 585 (7 Cir. 1971), held that Leyland's "delivery" of a short supply of Triumphs to McGeorge was a discriminatory allocation of services proscribed by § 2(e) of the Act[2] which provides that

> (e) It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, *any services or facilities* connected with the processing, handling, sale or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms. (Emphasis added).

[2] 15 U.S.C. § 13(e).

In *Centex-Winston*, the Seventh Circuit held that a wholesaler's delivery of lumber to a builder consistently later than contractually specified dates, while delivering lumber orders of the builder's competitors on time, was discrimination among purchasers in the furnishing of a service, i.e., delivery connected with the resale of a commodity.

[1] We are unable to agree with the conclusion of the district court for even if we were to accept the Seventh Circuit's characterization of delivery as a "service,"[3] factual distinctions in the present case render *Centex-Winston* inapposite. Unlike *Centex-Winston* in which the defendant contracted to deliver the commodities, the dealership agreement involved here required McGeorge to accept delivery of Triumphs at their point of arrival in Baltimore or engage independent transporters at its own risk. The record reveals that McGeorge frequently sent individual employees to Baltimore for the express purpose of driving new cars back to Richmond. The district court's reliance on *Centex-Winston* was thus misplaced. That Leyland was discriminating in the allocation of Triumphs, the commodity itself, as opposed to a service or facility connected with the resale of the commodity is obvious, and in our opinion places this case beyond the pale of Robinson-Patman. We conclude that Robinson-Patman was an improper basis for the judgment below.

II

[2-4] We do agree with the district court that Leyland's conduct in "shorting" McGeorge in the delivery of Triumphs in an attempt to compel it to accept the Rover and Land Rover lines constituted a lack of good faith on

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[3] For the contrary view see Rowe, Pricing and the Robinson-Patman Act, 41 Antitrust L.J. 98, 109 (1972).

its part under the Dealers Day in Court Act.[4] The DDICA, which has been described as "a fringe area of antitrust law * * * designed in part to supplement [those] laws,"[5] requires the manufacturer to act in good faith in carrying out the provisions of the franchise as well as in its termination, cancellation or non-renewal. Good faith, which is defined in Section 1(e) of the Act,[6] has been construed literally by the courts and must be determined in the context of actual or threatened coercion or intimidation, *Lawrence Chrysler Plymouth, Inc.* v. *Chrysler Corp.*, 461 F.2d 608 (7 Cir. 1972); *American Motor Sales Corporation* v.

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[4] § 1222. Authorization of suits against manufacturers; amount of recovery; defenses

An automobile dealer may bring suit against any automobile manufacturer engaged in commerce, in any district court of the United States in the district in which said manufacturer resides, or is found, or has an agent, without respect to the amount in controversy, and shall recover the damages by him sustained and the cost of suit by reason of the failure of said automobile manufacturer from and after August 8, 1956 to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise with said dealer: *Provided*, That in any such suit the manufacturer shall not be barred from asserting in defense of any such action the failure of the dealer to act in good faith. Aug. 8, 1956, c. 1038, § 2, 70 Stat. 1125; 15 U.S.C. § 1222.

[5] *Autowest, Inc.* v. *Peugeot, Inc.*, 434 F.2d 556, 561 (2 Cir. 1970).

[6] § 1221. *Definitions*

As used in this chapter—

* * * * *

(e) The term "good faith" shall mean the duty of each party to any franchise, and all officers, employees, or agents thereof to act in a fair and equitable manner toward each other so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party: *Provided*, That recommendation, endorsement, exposition, persuasion, urging or argument shall not be deemed to constitute a lack of good faith. Aug. 8, 1956, c. 1038, § 1, 70 Stat. 1125; 15 U.S.C. § 1221(e).

Semke, 384 F.2d 192 (10 Cir. 1967), and it now appears to be settled that a manufacturer's coercive attempt to force unwanted automobiles on a dealer constitutes bad faith dealing for purposes of the Act. *American Motor Sales* v. *Semke*, *supra*, and *see* House Report No. 2850, 84th Cong. 2d Sess. 9, 3 U.S.Code Cong. & Admin.News, pp. 4596, 4603 (1956).[7] We think it reasonable to read into McGeorge's dealership agreement an implied provision that in the event of a strike or casualty occasioning a reduction in the number of Triumphs exported to this Country the manufacturer would treat its dealers ratably and equitably. The district court's finding of coercion in the cutback of Triumphs is fully supported by the evidence, and the DDICA gives McGeorge a remedy for the loss of profits suffered by it as a result of this discriminatory action taken by Leyland in an effort to compel McGeorge to make a concession which was not required of it under the terms of its dealership.

[5] The more troublesome question on this aspect of this appeal is whether the district court was correct in holding that the non-renewal of McGeorge's dealership did not also constitute bad faith dealing under the Act. The district court concluded that Leyland's decision not to renew was made after the failure of coercive measures and not as a continuing part thereof, and that although Leyland had acted in bad faith with respect to the shortages, the refusal to renew was based upon a rational business decision. We are inclined to agree with this conclusion. The evidence clearly demonstrates that it was in the best interests of Leyland to market its Triumph and Rover lines

[7] "The existence of coercion or intimidation depends upon the circumstances arising in each particular case and may be inferred from a course of conduct. For example, manufacturer pressure, direct or indirect, upon a dealer to accept automobiles, parts, accessories, or supplies which the dealer does not need, want, or feel the market is able to absorb, may in appropriate instances constitute coercion or intimidation.

in the United States through dual dealerships and, indeed, that such dual dealerships were its only hope of improving the rather disappointing market performance of the Rovers. When McGeorge declined to accept such a dual dealership Leyland had a perfectly legitimate reason to refuse to renew its Triumph franchise. With no further contractual obligation to McGeorge, Leyland's decision to obtain a dealer who would carry out its marketing policy with respect to both Triumphs and Rovers was based on sound business considerations free from the "coercion or intimidation" proscribed by the Act.

[6] The plaintiff contends, however, that Leyland's conduct in its efforts to coerce McGeorge in the 1969-70 period fatally infected its 1970 decision to transfer the dual line to another dealer. To accept this charge of continuing bad faith, however, would permanently preclude Leyland from making any change in its marketing procedures at any time in the future and, in effect, the bond between dealer and manufacturer would be indissoluble. "A franchise is not a marriage for life,"[8] and the Act does not prohibit the manufacturer from terminating or refusing to renew the franchise of a dealer who is not providing the manufacturer with adequate representation or who refuses to carry out its legitimate marketing policies. "Nor does the [Act] curtail the manufacturer's right to cancel or not renew an inefficient or undesirable dealer's franchise."[9] It has been held that under the Act a manufacturer is not precluded from terminating or refusing to renew the franchise of a dealership which has not provided adequate sales representatives,[10] adequate facilities

[8] *Bateman* v. *Ford Motor Company*, 302 F.2d 63, 66 (3 Cir. 1962).

[9] H.R.Rep. No. 2850, 84th Cong.2d Sess. 9, U.S.Code Cong. & Admin.News, pp. 4596, 4603 (1956).

[10] *Garvin* v. *American Motor Sales Corporation*, 318 F.2d 518 (3 Cir. 1963); *Woodward* v. *General Motors Corporation*, 298 F.2d 121 (5 Cir. 1962).

for the conduct of the dealership,[11] or does not meet reasonable sales objectives.[12] We discern no significant difference between those cases and the present one where the evidence supports the conclusion that Leyland acted in the reasonable belief that its business welfare required a dual dealership arrangement.[13]

III

On its cross-appeal McGeorge contends that the shortage in the delivery of Triumphs and the subsequent refusal by Leyland to renew its dealership were merely progressive stages in a scheme to enforce a tie-in of Triumphs and Rovers, and that Leyland's conduct in this respect violated both Section 3 of the Clayton Act [14] and Section 1 of the Sherman Act [15] under the *per se* doctrine of *International Salt Co. v. United States*, 332 U.S. 392, 68 S.Ct. 12, 92

[11] *Milos v. Ford Motor Company*, 317 F.2d 712 (3 Cir. 1963); *Staten Island Motors, Inc. v. American Motors Sales Corp.*, 169 F.Supp. 378 (D.N.J.1959).

[12] *Frank Chevrolet Co. v. General Motors Corp.*, 419 F.2d 1054 (6 Cir. 1969).

[13] While the district judge found that McGeorge had not acted in bad faith, we note that business expediency in its relations with both Mercedes and Toyota influenced McGeorge to a large degree in its refusal to accept the dual dealership. Robert McGeorge testified that in the year 1969 his company sold 119 Mercedes, 246 Toyotas and 77 Triumphs. He further testified that his father, David McGeorge, had told him that he had spoken to Mercedes-Benz representatives about taking on Rover and that they "frowned" on it and that he felt "they would lift the franchise." The record further indicates that Toyota was pressing McGeorge to eliminate Triumphs and continue only with Toyota and Mercedes. This possibility played a significant part in Leyland's decision to seek another dealer who could guarantee more permanency.

[14] 15 U.S.C. § 14.

[15] 15 U.S.C. § 1.

L.Ed. 20 (1947). The district judge rejected this contention of McGeorge primarily upon his finding that Leyland's conduct did not impede or suppress competition nor did the proposed arrangement preclude McGeorge from continuing its representation of Mercedes-Benz or other motor cars competitive with Rover. We agree with this conclusion of the district court.

[7, 8] The "perceptible pattern of illegality" in "tying cases" was stated in *Times-Picayune* v. *United States*, 345 U.S. 594, 608-609, 73 S.Ct. 872, 880, 97 L.Ed. 1277 (1953):

> "When the seller enjoys a monopolistic position in the market for the 'tying' product, *or* if a substantial volume of commerce in the 'tied' product is restained, a tying arrangement violates the narrower standards expressed in § 3 of the Clayton Act because from either factor the requisite potential lessening of competition is inferred. And because for even a lawful monopolist it is 'unreasonable, *per se*, to foreclose competitors from any substantial market', a tying arrangement is banned by § 1 of the Sherman Act whenever *both* conditions are met."
>
> (Emphasis in original.)

Following this delineation of the hallmarks of illegality, however, the court made it clear that it is the resultant foreclosure of competition which offends the antitrust statutes. "The common core of the adjudicated unlawful tying arrangements is the forced purchase of a second distinct commodity with the desired purchase of a dominant 'tying' product, resulting in economic harm to competition in the 'tied' market." *Id.* at 614, 73 S.Ct. at 883. The address of the statutes to the anti-competitive effect of such an arrangement was emphasized by Mr. Justice Harlan in his dissenting opinion in *Northern Pac. R. Co.* v. *United States*, 356 U.S. 1, 14, 78 S.Ct. 514, 522, 2 L.Ed.2d 545 (1958):

> "It is not, as the Court intimates at one point in its opinion, that under the Sherman Act the tying clause

> is illegal *per se*; the *per se* illegality results from its use by virtue of a vendor's dominance over the tying interest to foreclose competitors from a substantial market in the tied interest."

Similarly, the decisions in our circuit have focused upon the competitive effect of the suspect conduct. In *McElhenney Co.* v. *Western Auto Supply Company*, 269 F.2d 332, 338-339 (4 Cir. 1959), Judge Sobeloff stated that

> "The gravamen of a Section 3 violation is the forbidden condition, agreement or understanding of exclusivity, and a proper pleading should assert this ultimate fact. It makes no difference whether this is voluntary or is imposed by coercion, but without such agreement, condition or understanding, there can be no statutory infraction. It is only in the presence of this essential element that consideration must be given as to whether competition may be substantially lessened or whether there is any tendency toward monopoly."

And in the later case of *Advance Business Systems & Supply Co.* v. *SCM Corporation*, 415 F.2d 55, 60 (4 Cir. 1969), Judge Sobeloff pointed out the manner in which competition is curbed by an illegal tie-in:

> "First, the buyer is prevented from seeking alternative sources of supply for the tied product; second, competing suppliers of the tied product are foreclosed from that part of the market which is subject to the tying arrangement."

The language in these decisions accords with the rationale of two classic cases in this area, *Fed. Trade Comm.* v. *Sinclair Co.*, 261 U.S. 463, 43 S.Ct. 450, 67 L.Ed. 746 (1923), and *United Shoe Mach. Co.* v. *United States*, 258 U.S. 451, 42 S.Ct. 363, 66 L.Ed. 708 (1922), that the vice of an illegal tie-in is the fact that the agreement or the effect thereof lessens competition in the tied product. We agree with the district judge that the dual dealership proposed by Leyland does not fall within that classification of arrangements which have no lawful business objective and "serve hardly any purpose beyond the suppression of competi-

tion."[16] The record supports the finding that Leyland's conduct did not impede nor tend to impede competition between Rover and other motor cars in its style and price range, and it is this fact which clearly distinguishes the case before us from the tie-ins which were condemned by the Court in *Fortner Enterprises* v. *United States Steel*, 394 U.S. 495, 89 S.Ct. 1252, 22 L.Ed.2d 495 (1969); *Northern Pac. R. Co.* v. *United States*, *supra*; and *International Salt Co.* v. *United States*, *supra*.

IV

[9] In granting McGeorge relief under the Robinson-Patman Act the district court, acting pursuant to Section 4 of the Clayton Act,[17] entered orders awarding treble damages in the amount of $109,176 and attorney's fees in the amount of $25,700. Since we conclude that McGeorge was not entitled to relief under the antitrust laws, this award of treble damages as well as attorney's fees was, of course, improper.

[10] In his initial computation of damages the district judge proceeded on the assumption that McGeorge should have received an additional 14 cars in the fall of 1969 and an additional 52 cars for the first seven months of 1970, or a total of 66 vehicles. Multiplying 66 by a gross profits factor of $708 per car, less certain adjustments, the court arrived at basic damages in the amount of $36,392. While the record supports the gross profits factor adopted by the district court, we agree with the defendant that the projected shortage of 52 cars in McGeorge's "allocation" for the first seven months of 1970 was erroneous.

In arriving at this projection the court accepted the formula propounded by the plaintiff's expert that 1967-68 sales of Triumphs to McGeorge amounted to 87 percent of the combined total of cars sold to three other designated

[16] *Standard Oil Co.* v. *United States*, 337 U.S. 293, 305-306, 69 S.Ct. 1051, 1058, 93 L.Ed. 1371 (1949).

[17] 15 U.S.C. § 15.

dealers, and the application of this percentage to the units supplied to the same three dealers in 1970 gave McGeorge a projected allocation of 83 cars for that period. Since McGeorge, in fact, received only 31 cars during the period, the court concluded that it had been shorted 52 units. In our opinion the basic percentage should have been McGeorge's share of the aggregate of the vehicles supplied to McGeorge as well as the three other designated dealers in 1967-68. This would result in a projected allocation to McGeorge of 47 percent, and when this is applied to the 126 units available and delivered to the same four dealers during the first seven months of 1970, McGeorge would be entitled to 59 cars, with a resultant shortage of 28 instead of the 52 found by the district court. Accordingly, the judgment of the district court will be set aside and the case remanded for the assessment of damages only under the DDICA, and in assessing these damages the district court shall apply the formula to a projected shortage of 14 cars in the fall of 1969 and 28 cars in the first seven months of 1970.

[Caption Omitted in Printing]

ORDER DENYING REHEARING

[Filed October 30, 1974]

Upon consideration of the MOTION FOR RECONSIDERATION AND SUGGESTION FOR REHEARING EN BANC filed on October 18, 1974, by David R. McGeorge Car Co., Inc.,

NOW, THEREFORE, with the concurrence and approval of the other members of the panel and in the absence of a request for a poll of the entire court, as provided by Appellate Rule 35(b),

It is ADJUDGED and ORDERED that the Motion for Reconsideration is denied.

/s/ JOHN A. SIMS, JR.
United States Circuit Judge

MEMORANDUM OPINION AND ORDER OF JANUARY 9, 1973

[Filed January 9, 1973]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, RICHMOND DIVISION

CIVIL ACTION NO. 346-71-R

DAVID R. MCGEORGE CAR CO., INC.

v.

BRITISH LEYLAND MOTORS, INC., ET AL.

David R. McGeorge Car Co., Inc. (McGeorge) brought this anti-trust action against British Leyland Motor Corporation, Ltd. (British Leyland), a British auto manufacturer, which subsequently was dismissed as a party defendant, and against its wholly owned domestic subsidiary, British Leyland Motors, Inc. and its wholly owned subsidiary, British Leyland Motor Sales, Inc. (both domestic companies hereinafter collectively referred to as Leyland) for damages accuring from alleged violations of federal anti-trust laws. Jurisdiction is attained by virtue of 15 U.S.C. § 1222 (Dealers' Day in Court Act), as well as 28 U.S.C. §1331 (federal question with respect to federal anti-trust legislation, *infra*) and 28 U.S.C. § 1332 (diversity jurisdiction). The respective parties, by counsel, have appeared before the Court sitting without a jury, for trial of this action, and it is upon same and the evidence adduced thereto that the Court makes its Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

The great quantity of exhibits and range of testimony submitted to the Court do not belie the fact that there are few, if any, controverted factual issues involved here. In short, McGeorge a foreign car dealer, carried the line of Triumph motorcars, manufactured by British Leyland,

but did not carry two other lines made by British Leyland, Rover and Land Rover. Leyland, in an effort to expand its Rover and Land Rover distribution, sought to have McGeorge take on those lines as well. When McGeorge refused, for reasons discussed *infra*, Leyland cut back McGeorge's allocation of Triumphs, of which at that time there was a general shortage of supply, both to pressure plaintiff to change its mind and to "cultivate" other area dealers who undertook to sell all three lines by supplying them with more Triumphs. That cut back gives rise to McGeorge's first claim. Subsequently, when McGeorge's dealership contract expired, Leyland refused to renew for the stated reason that it preferred an area dealer which would sell all three lines. This refusal to renew gives rise to McGeorge's second claim.

The Court's specific findings follows:

The McGeorge Car Company is a Richmond car dealer which between 1963 and July 1970 sold Triumph automobiles. During that period McGeorge also sold Toyota and Mercedes-Benz autos as well as used cars. Through 1968 McGeorge company was managed and run by its principal owner and president, David McGeorge, who, it is apparent from exhibits before the Court, was regarded by Leyland as a "tough" but good business man. Through 1968 and up to 1970, however, David McGeorge, partially as a result of illness, gradually turned over management responsibility to his son Robert, who Leyland initially regarded as "a good deal for us." (PX 21). Robert McGeorge subsequently became president after his father's death in September 1970, although it is clear he had been the effective manager for most of the period in question (1968-70). Some contention was made at trial that the difficulties between the parties in part stemmed from disaffection with Robert McGeorge's capabilities. There was, however, no evidence introduced in support thereof. The change in command, however, while not relevant to the cut back claim, does bear upon the renewal question.

The evidence before the Court indicates that McGeorge was an excellent Triumph dealer, which fact was admitted in testimony by Leyland's officers. McGeorge sold 72 Triumphs in 1967, 124 in 1968, and in 1969, when the difficulties commenced, 63 Triumphs. McGeorge led all other Virginia dealers during these years. In 1970, prior to termination, McGeorge sold 27 Triumphs.

McGeorge's best seller for these years was, however, Mercedes-Benz (121 units in 1968, 119 units in 1969 and 52 units for eight months of 1970), the sales of which produced the largest gross revenues. McGeorge also sold a sizeable quantity of Toyotas for these years as well (71, 246 and 276, respectively).

The three lines sold by McGeorge were uncompetitive with each other, the average Triumph retailing for $2800-$2900, Toyota about $2000 and Mercedes-Benz $6000 and over. Within the Triumph line, the TR-6 model was the best seller, the popular demand for which was continually in excess of supply.

In 1967, Leyland was faced with a desire to increase Rover and Land Rover sales. At that time the decision was made to induce existing Triumph dealers to take on the latter lines, the hope being to boost Rover distribution on the "coattails" of the popular Triumph. In 1968 McGeorge was approached by Leyland personnel in an effort to get the plaintiff to add these lines. McGeorge resisted, perhaps in part because of a lack in faith in the Rover products,[1] but for the most part because the Rover line would compete with Mercedes. McGeorge's position was further firmed by Mercedes' opposition to the proposal. Leyland's repeated offers in this regard were thus rebuffed by McGeorge.

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[1] The evidence indicates, however, that McGeorge was later willing to set up a Rover-Triumph dealership in a different location, which proposition was rejected by Leyland.

During the 1968-69 fiscal year, Leyland began undergoing a shortage of Triumph imports due to labor strikes in England, domestic dock strikes and production problems. While the exact extent of the shortage is not clear, the evidence indicates that Leyland's shipments were between 80 and 90% of the 1967-68 total. (DX-4 and PX-49) Said shortage was particularly serious with respect to the TR-6 model, which most dealers, including McGeorge, were apparently able to sell as quickly as the cars came in.

McGeorge began feeling the effects of the shortage in October 1969 through July 1970. The evidence is clear, however, that in McGeorge's case the shortage suffered went beyond the extent of the national shortage. The evidence discloses a clear attempt by Leyland to pressure plaintiff into taking on the Rover lines by shorting him, with the promise of "all the Triumphs he could use" as the inducement to cooperate. When it became clear to Leyland that McGeorge would not cooperate, the decision was made by May 1970 not to renew McGeorge's dealership. The deliberate shortage policy was thus continued, by admission of H. F. Fennarty, Leyland's Regional Manager, so that more Triumphs could be diverted to cooperative dealers with whom Leyland thought it had a future. (See also, PX-49).

The extent of the shortage is revealed by the delivery figures. McGeorge's Triumph sales for the years in question are compared in the following table:

City	Dealership	1967	1968	1969	Jan.-July 1970
Charlottesville	Coggins Motors Co.	13	15	12	4
Fredericksburg	Noble Cars (appointed 10/69)			10	51
Woodbridge	Cope Ford	18	28	5	(terminated 10/69)
Norfolk	John Copeland Motors	48	81	61	62
Hampton	Copeland Motor Car Co.	23	45	16	29
Richmond	McGeorge Car Co.	72	124	63	27

McGeorge's deliveries were cut 50% from 1968 to 1969, despite a large increase the year before. The first seven months of 1970, projected to a full year rate, show a further 16% decrease.[2] This may be compared with John Copeland Motors, a dealer in all three Leyland lines, which suffered a 25% decrease from 1968 to 1969, yet gained from 1969 to 1970 at a 93% projected rate on the basis of 12 months. These figures reflect the particularized shortage suffered by McGeorge over the 1969-1970 period. Compared to J. Copeland Motors, the plaintiff suffered a 30% greater decrease in 1969 and a 10% greater decrease in 1970. As can best be estimated, these figures represent a total of approximately 66 cars over that period.[3]

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[2] McGeorge actually received 31 cars, 4 of which were returned after termination. Figures computed on this basis.

[3] The Court adopts the calculations of plaintiff's expert in this regard:

Table 17

Estimation of Damages Resulting from Shortages October 1969, through July 1970.

1. In 1967-68 (the only years of no alleged shortages), McGeorge received on the average 87.1% as many cars as Coggins Motors, Copeland Motor Car Co., and John Copeland Motors (See table *supra*):

$$\frac{72 + 124}{84 + 141} = 87.1\%$$

2. Expected deliveries

1969: $0.871 \times 89 = 77.519 = 77$ cars (we round downward because 1970 is rounded upwards)

1970 (January through July): $0.871 \times 95 = 82.745 = 83$ cars

3. Alleged shortages

1969: $77 - 63 = 14$ cars
1970: $83 - 31 = 52$ cars.

TOTAL 66 cars

As stated above, McGeorge's dealership was not renewed in late summer 1970. The stated reason for said non-renewal, admitted by defendants, was McGeorge's refusal to carry all three lines. Subsequently, another Richmond dealer, Bradley Motors, agreed to take on the lines under Leyland's terms.[4]

Leyland has filed a counterclaim of $4342 against McGeorge for payments owing on spare parts. Crediting unpaid warrantee claims against this total, Leyland alleges an unpaid balance owing of $2417. In response, McGeorge has alleged a recoupment owing of $13,050.11 upon an alleged contractual promise by Leyland to repurchase unused parts upon expiration.

The Court finds McGeorge's contention with respect to repurchase upon expiration to be correct. Section 15 of the Dealer Sales Agreement. Leyland's counterclaim is thus without merit.

The Court finds, however, that there is insufficient proof before it as to the exact amount of spare parts left in plaintiff's possession. The Court must accordingly dismiss McGeorge's contended set off for failure to meet the required burden of proof.

Conclusion of Law

The Court concludes that McGeorge has sustained a cause of action for the shortage, for which recovery may be had, but has not done so for the refusal to renew. The Court's specific conclusions of law for each claim will be considered in turn.

Shortage

Plaintiff has propounded four theories upon which it seeks recovery, to wit:

1. Violation of Dealers' Day-in-Court Act.

[4] Interestingly, Leyland stopped importing Rovers in 1971 because of poor consumer response.

2. Violation of the Clayton Act, § 3, and Sherman Act, § 1 (illegal tie-in and refusal to deal).

3. Violation of the Robinson-Patman Act by virtue of discrimination.

4. Breach of contract.

The Dealers' Day-in-Court Act, 15 U.S.C. § 1222, provides:

> An automobile dealer may bring suit against any automobile manufacturer engaged in commerce, in any district court of the United States in the district in which said manufacturer resides, or is found, or has an agent, without respect to the amount in controversy, and shall recover the damages by him sustained and the cost of suit by reason of the failure of said automobile manufacturer from and after August 8, 1956 to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise with said dealer: *Provided*, That in any such suit the manufacturer shall not be barred from asserting in defense of any such action the failure of the dealer to act in good faith. Aug. 8, 1956, c. 1038 § 2, 70 Stat. 1125.

Upon its aforesaid findings of fact, the Court concludes that McGeorge has sustained injuries compensable under this section.[3] Leyland's efforts to persuade McGeorge to take on the other lines by holding back cars, and its subsequent continued discrimination against plaintiff after the decision not to renew was made, constitutes bad faith compensable under the Act. See *American Motors Sales Corp.* v. *Semke*, 384 F.2d 192 (10th Cir. 1967); *Junikki Imports* v. *Toyota Motor Co.*, 335 F. Supp. 593 (N.D. Ill. 1971). Nor is there any evidence before the Court that McGeorge acted in bad faith itself, which bad faith would

[3] The parties have stipulated, and the Court concurs, that they are dealer and manufacturer respectively within the meaning of the aforesaid provision.

bar recovery. McGeorge is entitled to recover damages hereunder (see damages discussion, *infra*).

Plaintiff has also proceeded under several interpretations of the Sherman and Clayton Acts, 15 U.S.C. § 1, 15 U.S.C. § 14. One theory, "Refusal to Deal," under the Sherman Act § 1, is not applicable to the shortage question. The cases in that regard are concerned with manufacturers who refuse to sell to a dealer altogether to effect a broad scheme. As plaintiff seems to concede, they are not addressed to the instant issue of delivery discrimination. See, *e.g. Klor's* v. *Broadway-Hale Stores*, 359 U.S. 207 (1958).

The second theory, of alleged "tie-ins," is also more appropriate to the refusal to renew issue. There is no question that Leyland sought a combined dealership arrangement here; the issue, rather, is whether said arrangement was legal under the Clayton Act or violative of it as an illegal tie-in. That question, however, is not appropriate to the instant issue of discrimination under the pre-October 1970 existing contract. See discussion, *infra*.

Plaintiff's third theory of relief relies on the Robinson-Patman Act, 15 U.S.C. § 13(e), which provides:

> (e) It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any *services or facilities connected with the processing, handling, sale*, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms. (Emphasis added)

The bone of contention here is not whether Leyland has discriminated, but whether said discrimination applied to "services or facilities."

The traditional interpretation of those words is "merchandising facilities." *Skinner* v. *United States, et al.* 233

F.2d 762 (5th Cir. 1956), including, for example, advertising services, promotional cards, demonstrators, etc. See Federal Trade Commission Guide, CCH Trade. Reg. Serv., ¶ 4003, § 240.5(b). See also, *Corn Products Refining Co.* v. *Federal Trade Comm.*, 324 U.S. 726 (1945). There is no indication that this section applies to discrimination in quantitative distribution of merchandise.

McGeorge, however, asserts that the "service" complained of within the meaning of the Act is delivery service, which falls within the structure of the Act. In support of this contention it cites *Centex-Winston Corp.* v. *Edward Hines Lumber Co.*, 477 F.2d 585 (7th Cir. 1970), in which the Court of Appeals for the Seventh Circuit held that the theory therein propounded extends traditional interpretation of the Robinson-Patman Act.

In *Centex-Winston* a Chicago area builder sued a lumber dealer to redress an alleged discriminatory scheme of consistently delivering lumber to plaintiff behind contractual schedules while delivering it to plaintiff's competitors in preference to the plaintiff. Relying on the spirit and intent of the Act, the Court construed said alleged discrimination as a valid claim for relief under the Robinson-Patman Act, refusing to read the term "services" in the traditional and narrow merchandizing sense. *Centex-Winston* and the instant matter can only be distinguished, if at all, on the basis of the contractual relationship between the parties: in *Centex-Winston*, deliveries were specified as to date and amount by contract; in the present case, Leyland's obligation and contract was to fill orders as quickly as possible once accepted.

The Court, nevertheless, finds this distinction dubious. Leyland's sole function was to distribute autocars produced by British Leyland. A major service inherent in this function is delivery of cars from the docks upon import. The rationale of *Centex-Winston*, which this Court accepts and adopts as a proper implementation of the spirit of the Robinson-Patman Act, is appropriate here.

The Court has found, *supra*, that Leyland favored John Copeland Motors and, in the process of shorting plaintiff, discriminated against it thereby. On the basis of the rule of *Centex-Winston*, the Court concludes that said discrimination constitutes a violation of the Robinson-Patman Act. The significance to plaintiff of the Court's further finding of a violation of this section is limited, however, in that recovery of treble damages is not recoverable under that section. *Nashville Milk Co.* v. *Carnation Co.*, 355 U.S. 373 (1958); *Englander Motors* v. *Ford Motor Co.*, 293 F.2d 802 (6th Cir. 1961).

Plaintiff's fourth theory relies on breach of contract. The gravamen of this contention is that under the dealership contract McGeorge was obligated to use its best efforts to purchase and sell 125 Triumph cars per year, and that said obligation implies a duty by Leyland to use its good faith efforts to supply same. The Court concludes this argument to be without merit. The purpose of this portion of the contract is to set forth a sales goal. The parties are not bound to same. To read an obligation of good faith into this portion beyond that imposed by normal canons of contract law and the Dealers' Day-in-Court Act would stretch the point. The Court need not pursue this claim further, however; for any liability for breach of good faith by Leyland has heretofore been discussed with reference to the Dealers' Day-in-Court Act.

The final question with regard to liability for shortage concerns which of the defendants is in fact responsible.

The Court has heretofore not treated the fact that McGeorge's franchise was technically held with British Leyland Motor Sales, Inc., a wholly owned subsidiary of British Leyland Motors, Inc. The operational distinction between these two corporations is not clear to the Court. Nevertheless, the shortages suffered by plaintiff were due to the acts of Motor Sales, with whom McGeorge held the franchise contract, and the Court's findings of fact and

conclusions of law are made with respect to that subsidiary only.

Refusal to Renew

The Court finds that Leyland's refusal to renew was amply supported by the provision of the 1968 Dealer Sales Agreement between the parties. No provision of the contract obligated Leyland to renew after its expiration. Additionally, had the contract not expired Leyland had the right to terminate for cause by virtue of the death of the principal, David McGeorge.

Nevertheless, the Court has found that Leyland's sole reason for refusal to renew was its decision to obtain a Richmond area dealer which would handle all three lines. The Court must thus consider whether said refusal was illegal by virtue of an attempted tie-in in violation of the anti-trust laws. Should the full line dealer arrangement which Leyland sought be permissible under the anti-trust laws, Leyland was within its rights not to renew; should it be an illegal tie-in, Leyland's refusal to deal constitutes an actionable violation of the Clayton Act, § 3.[6]

The Court concludes that the relevant case authority supports Leyland's position, i.e. that the full line dealer arrangement was permissible. The Court of Appeals for the Fourth Circuit set out the standards by which legality of a tie-in arrangement is judged under the Clayton Act § 3 in *Advanced Business Systems & Supply Co.* v. *SCM Corp.*, 415 F.2d 55 (1969). Under the Clayton Act the tie-in is illegal if one of two requisites is met:

1. The seller (here Leyland) enjoys a monopolistic position in the market for the tying product (Triumph), or

2. A substantial volume of commerce in the tied product (Rover) is restrained.

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[6] Tie-in arrangements have been held illegal with respect to tie-in of *goods* (under Clayton Act § 3) and *services* (under Sherman Act § 1). This matter properly involves the Clayton Act. See *Advanced Business Systems, infra.*

See, *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594 (1953). The Court has no evidence before it on which to form a conclusion as to Leyland's economic power over Triumph's market. Although said conclusion may properly be reached on inference by examination of the success of a tying arrangement, the Court's findings of fact indicate that, if anything, Leyland's failure with Rover is probative of its limited powers in the tying market here. Nevertheless a conclusion *contra* is not necessary to sustain *McGeorge's claim, for a tie-in* "*is automatically* illegal under § 3 whenever 'a substantial volume of commerce in the tied product is restrained'." *Advanced Business Systems, supra*, at 61, citing *Times-Picayune, supra*. The reasonableness of such an arrangement is not at issue under a Clayton Act claim, as in the case herein, although it is for Sherman Act § 1 purposes. *Advanced Business Systems, supra*. Thus, although the Court is impressed with the reasonableness of Leyland's plan, it is nevertheless precluded from considering that factor here and turns instead to the "substantial volume" question.

Ironically, Leyland is, in the Court's opinion, saved from liability here under the strict Clayton Act standards by its own failure in marketing Rovers. While little evidence has been presented with respect to the exact nature of the Rover market, it presumably includes foreign autos selling for about $6000 (including lower priced Mercedes-Benz cars). Whatever the components of that market may be, the Court nevertheless takes judicial notice of the fact that Rover's disastrous failure in the aforesaid Baltimore territorial market (126 cars in 1968, 119 in 1969, and 150 in 1970, Leyland's national sales comprising about 2/10 of 1%, .15% and .05% of all national imports for those years respectively), makes Rover's share of the market de minimis.[7] Absent a

[7] The Court is aware that authorities have differed on whether market share should be calculated quantitatively, in dollars, or qualitatively, in percentages. In *Fortner Enterprises, Inc.* v. *U.S.*

finding of restraint of trade in the tied product's (Rover) market, Leyland's policy is not illegal under the Clayton Act, § 3.

In conclusion, the Court finds that Leyland's refusal to renew was not violative of the Clayton Act.

Damages

Both parties have adduced expert testimony with respect to damages that may have been suffered by McGeorge as a result of the shortage. Unsurprisingly, a cursory glance at the respective estimates would prompt the uninformed observer to conclude that the respective experts were testifying in two completely separate cases. Plaintiff's expert estimated a loss of profit of $708 (1971 value dollars) (see Note 8, *infra*) per car; defendant's expert estimated $68 each. The disparity is not produced by use of different figures but by use of different accounting procedures. The Court will not discuss at length the divergent methods, evidence of which remains amply on the record. A salient summary will suffice.

Plaintiffs' calculations are based on a marginal cost method. The rationale for said method is that costs per unit sold gradually decrease as more cars are sold because costs inherent in the operation are necessarily absorbed by the first units marketed. Under this theory, the seller reaches a point in sales volume where, the costs being taken up by preceding units, profits on subsequent units sold be-

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Steel Corp., 394 U.S. 495 (1969), e.g., $200,000 was held not insubstantial. *Int'l. Salt v. United States*, 332 U.S. 392 (1947) offers the now well cited $500,000 standard. Both figures are exceeded here. The Court nevertheless concludes that a qualitative analysis is just here. The marginal nature of Rover business domestically, borne out by termination of Rover imports in 1971, prompts the Court to that conclusion.

comes unmatched by unit costs. In short, the sale of these latter units is "gravy." Relying on this theory, plaintiff's expert also calculated the profits generated by new car sales in the service and parts department and used car sales and trade-ins.

Defendant's expert used an average cost method, whereby variable costs are allocated to each unit sold on an average basis. Underlying this approach is the theory that car sales, in the auto business, pick up most costs so that the dealer makes his basic (free and clear) profits from service operations.

The Court, of course, can't simply average the two figures in its finding of damages; such a method bears no rational nexus to any recognized accounting method. Rather, the Court must choose that accounting method which in its opinion is just.

The Court concludes that plaintiff's method is the more reasonable. The peculiar nature of the damages suffered here, i.e., shortages in an undersupplied market, suggest that the sale of those cars shorted was dependent only on delivery. Had McGeorge received its 66 cars, it would have sold them. Further costs in promoting those sales would have been minimal and, in fact, costs appurtenant to operation of the Triumph franchise were already absorbed by what Triumph operations plaintiff was able to carry on despite the shortage. The Court thus adopts McGeorge's profit estimate of $708 per car.

Having reached this conclusion, the final step is calculation of damages for shortage of 66 cars at $708 profit each. That figure is obtained by multiplying these figures, and subtracting and estimated increased contribution to over-

head which would have derived from the sale of these cars. The Court adopts plaintiff's calculations in this regard:

Lost contribution to overhead [at the 1964-68 average of $708 (1971 $) per car]

1969: 14 x 708 = 9912 (1971 $) [8850[8] (1969 $)]

1970: 52 x 708 = 36816 (1971 $) [34,732 (1970 $)]

Extra contribution to overhead and profit on Triumphs sold during the period October, 1969 through July, 1970

Gross margin per new Triumph in 1970 (from Table 6):[9] 841 (1971 $)

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[8] The Court declines to compute damages at 1971 dollar value. Original dollar values for 1969 have been calculated by the Court by deflating plaintiff's damages at the 6% rate utilized by McGeorge. For 1969, this calculation is made according to the following formula:

X [1969 value damages] X 1.06 [1970 inflat.] x 1.06 [1971 inflat.] = 9912 [1971 value] x [1969 damages] = 8850

1970: x [1970 value damages] x 1.06 = 36,816 [1971 value] x [1969 value damages] = 34,732

[9] Plaintiff's Expert Report.

Average gross margin per new Triumph, 1964-68:	632
Difference	209 (1971 $)

1969

Estimated increase in gross margin per new Triumph:	209 (1971 $)
X New Triumphs sold during the last quarter	10
= Increased contribution to overhead and profits	2090 (1971 $)[10] [= 1866 (1969 $)]

1970

Estimated increase in gross margin per new Triumph:	209 (1971$)
X New Triumphs sold during January through July, 1971:	27
= Increased contribution to overhead and profits	5643 (1971 $)[10] [= 5324 (1970 $)]

Damages Estimates:

	1969	1970
Loss contribution to overhead and profit	8850	34,732
Less adjustment for increased gross margin	1866	5,324
	6984	29,408

Total $ 36,392

The Court deems interest on said damages appropriate. Said interest shall run at 6% from December 31, 1969 on $6984, and from September 1, 1970 on $29,408.

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[10] Deflated to actual dollar values, see Note 8.

Defendant British Leyland Motor Sales, Inc. shall be ordered to pay over in judgment to David R. McGeorge Car Co., Inc., the sum of thirty-six thousand, three hundred and ninety-two ($36,392) dollars, with interest as specified, *supra.*

An order consistent with this memorandum shall issue.

ROBERT R. MERHIGE, JR.
United States District Judge

Date: JAN. 9, 1973

ORDER OF JANUARY 9, 1973

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 346-71-R

DAVID R. MCGEORGE CAR CO., INC.

v.

BRITISH LEYLAND MOTORS, INC., ET AL.

ORDER

For the reasons stated in the memorandum of the Court this day filed, it is ADJUDGED and ORDERED that:

1. The defendant recover nothing of the plaintiff on its counterclaim, and

2. The plaintiff recover of the defendant, Leyland Motor Sales, Inc., the sum of Thirty-six Thousand Three Hundred Ninety-two ($36,392.00) Dollars with interest at 6% per annum on $6,984.00 from December 31, 1969, and on $29,408.00 from September 1, 1970, and its cost expended.

Let the Clerk send copies of the memorandum and this order to all counsel of record.

ROBERT R. MERHIGE, JR.
United States District Judge

Date: JAN. 9, 1973

SUPPLEMENTAL MEMORANDUM AND ORDER OF APRIL 10, 1973

[Filed April 10, 1973]

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 346-71-R

DAVID R. McGEORGE CAR CO., INC.

v.

BRITISH LEYLAND MOTORS, INC., ET AL.

This antitrust action came to trial before the Court on December 14, 1972, pursuant to which the Court entered judgment in favor of the plaintiff in the amount of $36,392.00, plus interest. See the Court's Order and Memorandum of January 9, 1973. Subsequently, it came to the attention of the Court that it may have erred in its conclusions of law with respect to liability under the Robinson-Patman Act, and the Court upon its own motion vacated the judgment. See Order of January 17, 1973. Counsel were requested to file with the Court such memorandum as they deemed appropriate in regard thereto, and have done so. Plaintiff's counsel has also urged the Court to reconsider several other legal issues, upon which both counsel have submitted memoranda.

Because technically judgment has not been entered in this action, the Court will adhere to its long standing rule that memoranda from counsel will always be welcomed and read up to the time of judgment and it will thus consider these additional points. Nevertheless, except as noted below, the Court herein adopts by reference its findings of fact and conclusions of law of January 9, 1973.

The issues raised by counsel will be discussed below *in seriatim:*

I. Liability Under Robinson-Patman Act

In its findings of January 9, 1973, the Court determined that McGeorge had been shorted 66 cars over the challenged period and concluded that said shortage presented an actionable claim for relief under the Robinson-Patman Act. On that basis the Court found that McGeorge was entitled to damages but not to treble damages. In the latter respect, all counsel and the Court are agreed that the Court erred: treble damages properly flow from a violation of Clayton Act § 2(e) (as amended by the Robinson-Patman Act § 1), 15 U.S.C. § 13(e).[1] Clayton Act § 4, 15 U.S.C. § 15, see, *e.g., Perkins* v. *Standard Oil Co.*, 395 U.S. 642 (1969).

While not disputing the treble damages issue, defendants have raised objections to the Court's initial conclusion that they are liable under the Robinson-Patman Act. Those objections are, in the main, twofold, consisting of, as stated by defendants, the following:

a. There was no violation of [the Robinson-Patman Act,' 15 U.S.C. § 13(e)].

b. If there was, plaintiff failed to prove that it was damaged by any "discriminatory" delays in deliveries.

Leyland's second contention is that even if a violation of the Robinson-Patman Act is found, McGeorge has failed to prove damages suffered thereby. Defendants in effect contend that the showing required here is two-part:

1. That McGeorge was discriminated against in the form of reduced deliveries.

2. That as a result of said reduction, McGeorge lost customers to competitors, which loss provides the measure of damages.

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[1] Hereinafter referred to as 15 U.S.C. § 13(e) or "Robinson-Patman Act."

Defendants further contend that McGeorge had not met the second burden.

The Court disagrees with this interpretation as applied to the case. The law is well-settled that damages in Robinson-Patman Act cases are measured by the showing of a causal relationship between losses suffered and the act of discrimination. *Dantzler* v. *Dictograph Products, Inc.*, 309 F.2d 326 (4th Cir. 1962). Thus, for example, in cases of *price* discrimination, the measure of damages is not adduced from the difference between prices paid by the claimant alleging discrimination and his competitors, but from the lost profit on sales the claimant would have retained had it not suffered price discrimination. See *Enterprise Industries* v. *Texas Co.*, 240 F.2d 457 (2d Cir. 1957). Similarly, in traditional "service" (*e.g.*, advertising, discrimination, damages must be shown by proof of customers—and profits—lost as a result of said discrimination. See *Dantzler*, *supra*, 309 F.2d 326. In each of these situations, however, what is measured is the damages which flow to the victim of discrimination as a result of the act of discrimination, not the benefit derived therefrom by the victim's competitors.

In this action, by the nature of the discrimination, the measure of damages is easily determined: it consists of those autos denied McGeorge for resale by virtue of the discriminatory policy. What he did not have, he could not sell and, inversely as the Court has found, what he did have he could sell. McGeorge has thus demonstrated damages resulting from the discrimination as measured by the actual shortage figure. Translated into dollars, as the Court has done in its memorandum of January 9, 1973, that amount is $36,392. Trebled, the measure of damages is $109,176. McGeorge is also entitled to reasonable attorney's fees, 15 U.S.C. § 15. Consistent with the Court's practice in that regard, respective counsel shall be directed to settle on an appropriate figure. If they fail to do so the Court will entertain an appropriate motion at the proper time.

II. Renewal: Application of Dealer's Day in Court Act

The plaintiff urges that Leyland's refusal to renew the dealership contract was a violation of the Dealer's Day-in-Court Act, 15 U.S.C. § 2222. In support thereof it cites several passages from legislative history which merely substantiate what the statute itself says in part. That an auto-dealer shall recover damages from a manufacturer who in bad faith refuses to renew a franchise. This Court has found, however, that although Leyland acted in bad faith with respect to the shortages, the refusal to renew was the result of what appears to the Court to have been a rational business decision. Absent bad faith in this regard, no recovery can be had under the statute. *RAC Motors, Inc. v. World-Wide Volkswagon Corp.*, 314 F. Supp 681 (D. N.J. 1970). The statute is not addressed to a "lack of good faith in the ordinary sense, but a lack of good faith in which 'coercion, intimidation or threats' are at least implicit." *Globe Motors v. Studenbaker-Packard Corp.*, 328 F.2d 645 (3d Cir. 1964). While the shortage complained of was part of a coercive effort of defendant to induce McGeorge to take on the Rover line, the ultimate decision not to renew was made after the failure of said effort and not as a continuing part thereof. McGeorge's claim on this count is without merit.

III. Refusal to Renew: Tie-In Under Clayton Act § 3 and Sherman Act § 1

The plaintiff has raised serious objections to the Court's conclusions of law in this regard. Although for reasons stated *infra* the Court declines to alter its ultimate conclusion, the Court is nevertheless constrained to clarify and explicate its views.

The Court has found that the tying arrangement complained of is both in effect and in scope *de minimis*. In this context, the Court concluded that McGeorge failed to prove either that Leyland had a dominant position in the tying

market (Triumph's market) by which it could effect the tying arrangement on a broad scale or that a "not insubstantial" amount of competition in the tied product (Rover) had been forestalled. Proof of either would demonstrate an illegal tie-in *per se* under Clayton Act § 3. *Advance Business Systems* v. *SCM*, 415 F.2d 55 (4th Cir. 1969). Plaintiff here contests both conclusions as well as the Court's application of a qualitative substantiality test to the latter requirement. In this respect plaintiff's position may be well taken,[3] but in view of another problem is academic.

An initial prerequisite to application of § 3 is the so-called "Exclusionary Condition," by which is meant that as an element of the challenged arrangement the "victim," for want of a better term, is forced to forego the use or purchase of competitive products. See *McElhenney Co.* v. *Western Auto Supply Co.*, 269 F.2d 332 (4th Cir. 1959). The Exclusionary Condition need not be formalized but may in fact be met by the practical operational effect of the proposed arrangement. *United Shoe Machinery Corp.* v. *United States*, 258 U.S. 451, 456-7 (1922); *Signode Steel Strapping Co.* v. *FTC*, 132 F.2d 48 (4th Cir. 1942). Thus, for example, the copy machine manufacturer which ties the use of its own copy paper to the leases of its machines, thereby in practical effect foreclosing the competitive use of

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[3] The proper inquiry is whether a "not insubstantial" amount of commerce in the tied product has been affected. Application of this test requires measurement of sales of the tied product, and accordingly, in this context, the sale of "tied" Rovers. In this respect, the Court erred in taking into account *all* Rovers sold in the Baltimore territorial market. The evidence is unclear as to territorial or even national sales of *tied* Rovers. The sales in Virginia, however, for 1970 and 1971, amount to approximately two dozen "tied" Rovers, the *retail* value of which does not exceed the $200,000 amount named in *Fortner Enterprises, Inc.* v. *U. S. Steel Corp.*, 394 U.S. 495 (1969), or the $500,000 standard of *Int'l. Salt* v. *United States*, 332 U.S. 392 (1947). Whether sales for the entire tied market exceeds these figures is, though probable, not proven by the evidence.

other brand papers, fulfills the Exclusionary Condition. See *Advance Business Systems, supra.* Absent the Exclusionary Condition, competition is not, in effect, impeded for purposes of § 3 even though, as here, commerce between buyer and seller may not be truly reflective of market demand for the tied product.[4] There is no evidence here that Leyland, as part of its tie-in scheme, formally required McGeorge to forego the sale of Mercedes-Benz autos (roughly competitive with Rover). Nor is it certain that the practical result would have been the same. To the *contrary*, McGeorge did eventually offer to sell the Rover line at a different location, Mercedes' objections notwithstanding. McGeorge has not proved the Exclusionary Condition herein, and as such, is precluded from further asserting a Clayton Act § 3 claim, and for reasons that follow, a Sherman Act § 1 claim on that basis.

Sherman Act § 1, 15 U.S.C. § 1, prohibits contracts in restraint of trade or commerce. One of the judicial theories explicative of this prohibition has been given the rubric of "Refusal to Deal," the gravamen of which theory has been aptly stated by plaintiff:

> The general rule, therefore, is that a manufacturer may establish a policy and refuse to deal with those not adhering to it *only* in the absence of any arrangement or combination restraining trade. He may not do so in furtherance of an illegal or prohibited scheme. Plaintiff's Trial Memorandum at p. 8. *See United States* v. *Parke, Davis & Co.*, 352 U.S. 29 (1960).

Traditionally arrangements restrain trade, for the purposes of this theory, if they are addressed to certain illegal purposes, for example the elimination of price-cutting dealers, see *Klor's* v. *Broadway-Hale Stores*, 359 U.S. 207 (1958) or the exclusion of new competition from the market, see *Radiant Burneys* v. *Peoples Gas Co.*, 364 U.S.

[4] Claims in that regard are properly litigated under Sherman Act § 1, discussed *infra.*

656 (1961). Additionally, the Court of Appeals for the Fourth Circuit has held that a refusal to deal which is motivated by the attempt to enforce an illegal tie-in is also violative of Sherman Act § 1. *Osborn* v. *Sinclair Refining Co.*, 324 F.2d 566 (4th Cir. 1963). Clearly, however, a preliminary requirement in this regard is the finding of an illegal tie-in scheme. McGeorge has, however, not proved an illegal tie-in and its reliance on this Sherman Act theory is therefore misplaced. Further, absent restraint of trade (and the Court has found none here of greater than a *de minimis* amount), recovery under $1 on any theory is foreclosed.

IV. The Counterclaim: Spare Parts.

The Court has been urged by McGeorge to reconsider its findings with respect to the counterclaim by Leyland for payments owing on spare parts, and McGeorge's set-off for Leyland's alleged breach of promise to repurchase unsold spare parts following non-renewal. In support thereof, McGeorge has offered proof of the exact state of said inventory at present. In response Leyland claims that McGeorge has failed to comply with the thirty day provision of the 1968 Dealership Contract for return of parts. The Court, nevertheless, declines to alter its findings. It is not clear, for example, how much of that inventory McGeorge has retained for purposes of serving his former Triumph customers, or for that matter whether Leyland waived the thirty day rule with respect to part or all of said inventory. In short, the Court has found that neither party has met its burden of proof and the Court chooses not to alter that finding.

An order consistent with this supplemental memorandum and the memorandum of January 9, 1973, as incorporated by reference, shall enter.

Robert R. Merhige, Jr.
United States District Judge

Date: April 10, 1973

ORDER OF APRIL 10, 1973

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 346-71-R

DAVID R. MCGEORGE CAR CO., INC.

v.

BRITISH LEYLAND MOTORS, INC., ET AL.,

ORDER

For the reasons stated in the memorandum of the Court this day filed, it is ADJUDGED and ORDERED that:

1. The defendant recover nothing of the plaintiff on its counterclaim, and

2. The plaintiff recover of the defendant, Leyland Motor Sales, Inc., the sum of One Hundred and Nine Thousand, One Hundred and Seventy-six ($109,176.00) Dollars, and its costs expended, with interest from this date. Counsel are directed to meet in accordance with the memorandum in an effort to settle upon an appropriate figure for an award of counsel fees.

Let the Clerk send copies of the memorandum and this order to all counsel of record.

ROBERT R. MERHIGE, JR.
United States District Judge

Date: APRIL 10, 1973

AUTOMOBILE DEALERS DAY IN COURT ACT
15 USCA §§ 1221-1225

§ 1221. *Definitions*

As used in this chapter—

(a) The term "automobile manufacturer" shall mean any person, partnership, corporation, association, or other form of business enterprise engaged in the manufacturing or assembling of passenger cars, trucks, or station wagons, including any person, partnership or corporation which acts for and is under the control of such manufacturer or assembler in connection with the distribution of said automotive vehicles.

(b) The term "franchise" shall mean the written agreement or contract between any automobile manufacturer engaged in commerce and any automobile dealer which purports to fix the legal rights and liabilities of the parties to such agreement or contract.

(c) The term "automobile dealer" shall mean any person, partnership, corporation, association, or other form of business enterprise resident in the United States or in any Territory thereof or in the District of Columbia operating under the terms of a franchise and engaged in the sale or distribution of passenger cars, trucks, or station wagons.

(d) The term "commerce" shall mean commerce among the several States of the United States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or among the Territories or between any Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation.

(e) The term "good faith" shall mean the duty of each party to any franchise, and all officers, employees, or agents thereof to act in a fair and equitable manner toward each other so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party: *Provided*, That recommendation,

endorsement, exposition, persuasion, urging or argument shall not be deemed to constitute a lack of good faith. Aug. 8, 1956, c. 1038, § 1, 70 Stat. 1125.

§ 1222. *Authorization of suits against manufacturers; amount of recovery; defenses*

An automobile dealer may bring suit against any automobile manufacturer engaged in commerce, in any district court of the United States in the district in which said manufacturer resides, or is found, or has an agent, without respect to the amount in controversy, and shall recover the damages by him sustained and the cost of suit by reason of the failure of said automobile manufacturer from and after August 8, 1956 to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise with said dealer: *Provided*, That in any such suit the manufacturer shall not be barred from asserting in defense of any such action the failure of the dealer to act in good faith. Aug. 8, 1956, c. 1038, § 2, 70 Stat.

§ 1223. *Limitations*

Any action brought pursuant to this chapter shall be forever barred unless commenced within three years after the cause of action shall have accrued. Aug. 8, 1956, c. 1038, § 3, 70 Stat. 1125.

§ 1224. *Antitrust laws as affected*

No provision of this chapter shall repeal, modify, or supersede, directly or indirectly, any provision of the antitrust laws of the United States. Aug. 8, 1956, c. 1038, § 4, 70 Stat. 1125.

§ 1225. *State laws as affected*

This chapter shall not invalidate any provision of the laws of any State except insofar as there is a direct conflict between an express provision of this chapter and an express provision of State law which can not be reconciled. Aug. 8, 1956, c. 1038, § 5, 70 Stat. 1126.

SECTION 1 OF THE SHERMAN ACT
15 U.S.C. § 1

§ 1. *Trust, etc., in restraint of trade illegal; exception of resale price agreements; penalty*

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commondity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

July 2, 1890, c. 647, §1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 593; July 7, 1955, c. 281, 69 Stat. 282.